SUPREME COURT, U.S.
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No. 03-531

IN THE

Supreme Court of the United States

YARDARM RESTAURANT, INC.,

Petitioner,

v.

THE CITY OF POMPANO BEACH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

BRIEF IN OPPOSITION

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The Respondent, the City of Pompano Beach (the "City"), respectfully requests this Court to deny the Petition for Writ of *Certiorari*. The Fourth District Court of Appeal's decision did not create any conflict, let alone an intolerable conflict among the nation's lower courts. Nor did the Fourth District Court of Appeal commit any error so important that it must be corrected immediately.

OPINIONS BELOW

The opinion of the Fourth District Court of Appeal ("Fourth District"), entered on October 9, 2002 and attached as Appendix 1 through 19 to the Petition, is reported as *City of Pompano Beach v. Yardarm Restaurant, Inc.*, 834 So. 2d 861 (Fla. Dist. Ct. App. 2002) ("*Yardarm II*"). Petitioner's Motion for Rehearing, Rehearing *En Banc*, and to Certify Questions of Great Public Importance were denied on February 4, 2003 by Order of the Fourth District, which is attached as Appendix 20 through 21 to the Petition. Petitioner's Petition for Discretionary Review of *Yardarm II* by the Supreme Court of Florida was denied on July 16, 2003, which order is attached as Appendix 120 through 121 to the Petition.

An earlier opinion of the Fourth District in favor of the City entered on September 9, 1994 and attached as Appendix 22 through 47 to the Petition, is reported as *City of Pompano Beach v. Yardarm Restaurant, Inc.*, 641 So. 2d 1377 (Fla. Dist. Ct. App. 1994) ("*Yardarm I*"). Petitioner's Petition for Discretionary Review of *Yardarm I* by the Supreme Court of Florida was denied. *Yardarm Restaurant, Inc. v. City of Pompano Beach*, 651 So. 2d 1197 (Fla. 1995). This Court also denied Petitioner's Petition for Writ of *Certiorari* of *Yardarm I*. *See Yardarm Restaurant, Inc. v. City of Pompano Beach*, 515 U.S. 1144 (1995).

STATEMENT OF THE CASE[1]

In 1987, Petitioner filed a two count Complaint alleging that the City had taken its property, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and the Florida Constitution, and 42 U.S.C. § 1983. (App. at p. 31). Both counts alleged that, starting in 1973, the City took Petitioner's property by engaging in obstructionist tactics of Petitioner's proposed hotel projects with respect to issuance and revocation of building permits. (App. at p. 31).

In 1990, the trial court granted partial summary judgment in favor of the City on Yardarm's federal takings claims, agreeing that Yardarm could not pursue its federal takings claims until it had exhausted its state law takings claim. (App. at p. 31 n.6).

Trial on Petitioner's state law takings claim occurred in 1991 (the "1991 Trial"). (App. at p. 31). The City defended Petitioner's claims by introducing evidence that Petitioner had a building permit in place from 1977 to 1979, and from July, 1981 to May, 1985, Petitioner's inability to obtain financing

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1. In accordance with its obligation to the Court to point out any perceived misstatement made in the Petition, SUP. CT. R. 15(2), the City hereby disputes Petitioner's purported "facts" in its "Jurisdiction" and "Statement of the Case" sections, and throughout the Petition, because such "facts" are not borne out by the Record below or the Fourth District's decisions. (App. at pp. 1-19, and 22-47). In addition to presenting "facts" that are unsupported by, and in most instances directly contrary to, the Record, Petitioner erroneously represents that the factual "findings [of the trial court] were not reversed by the [Fourth District,]" (Pet. at p. 3 n.2), when in actuality both judgments (App. at pp. 48-95, and 96-115) were reversed in their entirety. (App. at pp. 1-19, and 22-47). In both *Yardarm I* and *Yardarm II*, the Fourth District, in reversing the trial court, provided the operative facts. (App. at pp. 1-19, and 22-47). ***The facts of this case, as stated by the Fourth District in Yardarm I and Yardarm II, do not present the issues or questions raised by Petitioner in its Petition.***

was due to causes unrelated to the City's earlier alleged actions (in 1973-74), and Petitioner ultimately lost its property in 1986 not because of the City, but because it had mortgaged its East Side property to buy the West Side property. (App. at pp. 31-32).

The trial court in the 1991 Trial found that the City had effected a permanent taking. (App. at pp. 2 and 32). However, in 1994, the Fourth District reversed, holding in *Yardarm I* that: (1) the facts did not support a taking claim because Petitioner had not been deprived of substantially all use of its property; (2) the trial court's findings suggesting that harassment had continued after 1981 were unsupported by the record; and (3) the statute of limitations had run on any taking claim because there was no record evidence that would support a finding that there was a taking by the City after September 15, 1983. (App. at pp. 2, 9, and 47).

Afterward, Petitioner sought review from the Florida Supreme Court and this Court, which requests were denied. 651 So. 2d 1197 (Fla. 1995); 515 U.S. 1144 (1995). The case was then remanded for reconsideration of the summary disposition of the purported substantive due process claim, however, the Fourth District expressly declined to rule on the merits of any such claim. (App. at pp. 2, and 46-47).

Thereafter, the trial court reinstated Petitioner's Complaint as a "substantive due process claim," and the case proceeded to a bifurcated trial on liability (the "1998 Trial"). (App. at pp. 2, and 10 n.3). In February 1999, the trial court entered Petitioner's proposed Judgment Determining Liability[2] (the "1999

2. The trial judge merely signed his name to the 36 page document created by Petitioner. "The cases admonishing trial courts for the verbatim adoption of proposed orders drafted by litigants are legion." *Colony Square So. v. Prudential Ins. Co.*, 819 F.2d 272, (Cont'd)

Judgment"), and the City appealed. (App. at pp. 1-3). The resulting decision by the Fourth District, (App. at pp. 1-19), reversed the 1999 Judgment in its entirety. (App. at p. 19).

REASONS FOR DENYING THE PETITION

Petitioner essentially advances five (5) grounds upon which it suggests that this Court should grant *certiorari* review: (i) that *Yardarm II* conflicts with federal takings law; (ii) that *Yardarm II* conflicts with federal substantive due process law with respect to whether a plaintiff has substantive due process protection over state created rights; (iii) that *Yardarm II* conflicts with federal substantive due process law with respect to the concept of executive vs. legislative acts; (iv) that *Yardarm II* conflicts with federal procedural due process law; and (v) there is a need to expand the substantive component of due process to create a federal cause of action for developers whose property has not been taken and who have not been deprived of any fundamental right. None of the grounds support a case for review. The Fourth District decision did not create any conflict, let alone an intolerable conflict among the nation's lower courts. Nor did the Fourth District commit any error so important that it must be corrected immediately, and there is no need for this Court to create a federal cause of action for developers whose property has not been taken and who have not been deprived of any fundamental right.

(Cont'd)

274-75, 276 n.9 (11th Cir. 1987), *cert. denied*, 485 U.S. 977 (1988); *see also Roberts v. Moss*, 344 F.2d 747, 752 (3d Cir. 1965); *FMC Corp. v. Varco Int'l, Inc.*, 677 F.2d 500, 502 n.2 (5th Cir. 1982); *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1373 n.46 (11th Cir. 1997); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 657 n.4 (1964).

I. *YARDARM II* DOES NOT CONFLICT WITH FEDERAL TAKINGS LAW BECAUSE, *INTER ALIA*, THE FOURTH DISTRICT'S DECISION THAT PETITIONER'S TAKINGS CLAIM WAS BARRED AS *RES JUDICATA* WAS BASED ON FLORIDA LAW.

Petitioner first seeks review of the holding in *Yardarm II* that its federal takings claim was barred as *res judicata* under state law. The sole asserted conflict is with a decision of this Court which was not addressed in *Yardarm II* or by the trial court, and is predicated on a federal takings claim which was not even tried below.[3] Petitioner inaccurately portrays *Yardarm II* as having rejected this Court's *Agins v. City of Tiburon* decision, 447 U.S. 255 (1980), and as conflicting with this Court's subsequent "takings" cases. In fact, *Yardarm II* makes *no* reference *at all* either to *Agins* or to the federal takings issues raised by Petitioner in its Petition, and disposes of the federal takings claim *solely* on the independent state law ground that it was barred as *res judicata* under Florida law. Regardless of whether it is viewed as an issue of jurisdiction or of prudence, this Court should not address the complex takings issues raised by

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3. The trial court's 1999 Judgment expressly recognized that the "legal principles [upon which] this case was tried" were *only* alleged violations of due process under 42 U.S.C. § 1983, and *not* federal takings claims, although the trial court also blanketly adopted in the 1999 Judgment Petitioner's proposed footnote that stated that he nonetheless "believes that the facts presented support a takings claim." (App. at p. 70). The only reference to a takings claim in the 1999 Judgment is in that cursory footnote, and nowhere is there any reference to *Agins* or any other federal takings issues. Moreover, *Yardarm I* had limited the scope of its remand to consideration by the trial court of Petitioner's federal "due process" claim, not its federal "takings" claim. (App. at pp. 46-47).

Petitioner here where those issues were not tried below, and instead were disposed of on an independent state law basis.

It is instructive that Petitioner does *not* cite to the *Yardarm II* decision it asks this Court to review in contending that the Fourth District "refus[ed] to apply" and "criticized" *Agins*, but instead only cites to the ten-year old *Yardarm I* opinion (Pet. at p. 27), which did neither.[4] First, *Yardarm I* did *not* reject *Agins* or even suggest that Florida takings law differed from the federal takings precedent it sought to follow. To the contrary, *Yardarm I* only recognized that back in 1994 confusion had arisen regarding some aspects of regulatory "takings" law,[5] but ultimately adjudicated Petitioner's takings claim based on an alternative independent state law basis. (App. at pp. 2, and 43-47).

Yardarm I did *not* reverse the 1991 Judgment solely because Petitioner had not shown it was denied economically viable use of its land. Instead, as was later recognized in *Yardarm II* (App. at p. 2), the Fourth District in *Yardarm I* had based its 1994 decision on an independent state law ground — Petitioner's takings claim was barred by the applicable four year statute of limitations under state law. (App. at pp. 2, and 43-47). *Yardarm I* held that even if there had been a taking of Petitioner's property as Petitioner contended, then the record demonstrated that any such taking

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4. Similarly, Petitioner cites only to the 1991 Judgment (App. at pp. 96-115) which was reversed in *Yardarm I*, (App. at pp. 22-47), rather than the 1999 Judgment, (App. at pp. 48-95), which is the subject of *Yardarm II*, (App. at pp. 22-47), in asserting that the trial court had found the City's actions were political and without relation to proper police power objectives. (Pet. at pp. 9-10).

5. In *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001), this Court recognized that it had given "some, but not too specific guidance to courts" regarding regulatory takings.

had occurred more than four years before the commencement of the lawsuit in 1987, and was time-barred under Florida law. *Id.*

Importantly, *Yardarm II* did *not* decide the federal question of whether or not a takings claim can be predicated solely by proving that the denial of a building permit failed to substantially advance legitimate state interests.[6] In a plain statement of the adequate and independent state law grounds for its decision,[7] *Yardarm II* only applied Florida state law governing claim and issue preclusion in finding that its earlier decision in *Yardarm I* operated as *res judicata* with respect to any takings claim which may be encompassed by the 1999 Judgment: *Yardarm I* "in addition to being the law of the case with respect to the state law takings claim, was issue preclusion, or *res judicata*, on [Petitioner]'s federal takings claim." (App. at p. 9).[8] In turn, *Yardarm I* had decided the takings issue on an independent state law ground that the takings claim was barred by the four-year statute of limitations. (App. at pp. 2, and 43-47).

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6. The City disputes Petitioner's characterizations of the scope of *Agins* and its progeny, and of the purported "two-prong takings test." The City also disputes Petitioner's assertion that the City's actions were motivated by a desire to provide unobstructed harbor views, and failed to substantially advance legitimate state interests. However, for the reasons set forth herein, review should be denied without regard to these disputes.

7. *Michigan v. Long*, 463 U.S. 1032, 1037-44 (1983).

8. Federal claims asserted in federal court are also subject to the same preclusive *res judicata* effect of a prior state court judgment as would be given to that judgment under the law of the state in which that judgment was rendered. *Migra v. Warren City School Dist. Board of Educ.*, 465 U.S. 75, 81 (1984).

Yardarm II only held that *Yardarm I* operated under Florida's *res judicata* principles to bar Petitioner's federal takings claim, and did *not* seek to interpret *Agins* or this Court's federal takings precedent. Because both federal and Florida takings claims are subject to a four-year statute of limitations,[9] and Petitioner had not contended that the purported "takings" underlying its federal takings claim differed from the purported "takings" which had been at issue in *Yardarm I*,[10] the time-bar of Petitioner's state law takings claim adjudicated in *Yardarm I* operated as *res judicata* with respect to Petitioner's federal takings claim.

Although Petitioner's federal takings claim did not become ripe until after its state takings claim had been rejected in *Yardarm I*, the time-barring of the property owner's state takings claim results in a forfeiture of that property owner's federal takings claim because a property owner cannot extend the limitations period on federal takings claims by delaying to file a state takings claim until after the limitations period has expired:

> [T]he cases hold that the federal claim is unripe until state remedies are exhausted. But a claimant cannot be permitted to let the time for seeking a state remedy pass without doing anything to obtain it and then proceed in federal court on the basis that no state remedies are open.

Gamble v. Eau Claire County, 5 F.3d 285, 286 (7th Cir. 1993), *cert. denied*, 510 U.S. 1129 (1994); *accord Pascoag*

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9. *Daugherty v. Sarasota County*, 157 F.R.D. 542, 547 (M.D. Fla. 1994).

10. The 1999 Judgment acknowledged that "this case was tried" under the due process principles raised in Count II, rather than the "takings" claim which had been raised in Count I. (App. at p. 70).

Reservoir & Dam, LLC v. Rhode Island, 337 F.3d 87, 94-95 (1st Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3292 (Oct. 17, 2003); *Vandor, Inc. v. Militello*, 301 F.3d 37, 38 (2d Cir. 2002); *Harbours Pointe of Nashotah v. Village of Nashotah*, 278 F.3d 701, 706 (7th Cir. 2002) (property owner "failed to pursue its state remedies in a timely fashion and has forfeited its right to assert a claim for just compensation under either Wisconsin or federal law").

This Court has repeatedly emphasized that in accepting jurisdiction to review a state court decision:

> it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.

Lynch v. People of New York, 293 U.S. 52, 54 (1934). Accordingly, this Court

> will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. . . . [R]esolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory.

Coleman v. Thompson, 501 U.S. 722, 729 (1991).

Specifically, where a state appellate court relies upon the state law of *res judicata* to deny a federal constitutional claim, in lieu of addressing the merits of the federal claim,

then "the Court will not undertake to review it." *Durley v. Mayo*, 351 U.S. 277, 281 (1956).

Here, *Yardarm II* relied upon the independent state law of *res judicata* in denying Petitioner's federal takings claim, and the predicate for that application of *res judicata* was the *Yardarm I* decision which itself relied upon an independent state law statute of limitations defense in disposing of that takings claim.[11] Accordingly, *Yardarm II* decided an independent state law question — rather than the federal question posed by Petitioner in its Petition — in denying Petitioner relief with respect to its federal takings claim. Even if the Court had jurisdiction to review *Yardarm II* based on the federal takings question posed by Petitioner, it would not be prudent for this Court to do so on this record where the state appellate court decision under review cites only to an independent state law ground for its decision, and the federal takings claim was not even tried below. *See Adams v. Robertson*, 520 U.S. 83, 90 (1997); *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 79-80 (1988) (regardless of whether certain federal questions were sufficiently "pressed or passed upon below" in state court to satisfy the prerequisites to this Court's certiorari jurisdiction, it was not prudent to review those complex questions based on such a record).

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11. This Court has declared it will not overturn purported errors in the adjudication of state law by an intermediate state appellate court where, as here, the state supreme court has denied review of that decision. *Hicks v. Feiock*, 485 U.S. 624, 629-30 (1988). This Court also has expressed its reluctance to review the propriety of such adjudications of state law issues in the context of federal takings claims: "We are not disposed to displace the considered judgment of the Court of Appeals on an issue whose resolution is so contingent upon an analysis of state law." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 486 n.15 (1987).

In any event, even if *Yardarm I* had not been predicated upon an independent state statute of limitations defense, *Yardarm II* cannot be used to obtain belated review of *Yardarm I*'s *dictum* regarding *Agins* and "takings" law. Yardarm is seeking indirectly what it could not get directly — this Court's review of the previous Fourth District opinion in *Yardarm I*. Nine years ago, Yardarm sought review from this Court of *Yardarm I*, but its *certiorari* petition was denied. 515 U.S. 1144 (1995). Yardarm is attempting to get a second bite at the apple, and effectively asking the current Court to second-guess the denial of *certiorari* review back in 1995. It should not be permitted to do so, and the Petition should be denied.

II. THERE IS NO DECISIONAL CONFLICT BETWEEN *YARDARM II* AND ANY APPLICABLE FEDERAL CASE CITED BY PETITIONER REGARDING WHETHER PETITIONER'S STATE CREATED RIGHTS WERE ENTITLED TO SUBSTANTIVE DUE PROCESS PROTECTION.

The Fourth District in *Yardarm II* properly, and consistent with this nation's substantive due process law, concluded that Petitioner had no substantive due process rights in its building permits because, *inter alia*, building permits are state created rights, not fundamental rights guaranteed by the Constitution, *and* the acts complained of, *i.e.*, the revocation and lapsing of Petitioner's building permits, were "executive" not "legislative." (App. at pp. 16-19).[12]

12. Specifically, the Fourth District held in pertinent part that: Yardarm may not recover for damages under its federal substantive due process claim that the City denied or delayed its building permits for improper reasons[,] [because] [a]pplying *McKinney* [*v. Pate*, 20 F.3d 1550 (11th Cir. 1994), *cert. denied*, 513 U.S. 1110 (1995)] to

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The threshold inquiry for a non-legislative substantive due process claim is whether a plaintiff has demonstrated an interest to which substantive due process protection applies.[13] *Nicholas v. Pennsylvania State Univ.*, 227 F.3d 133, 139 (3d Cir. 2000). Substantive due process protects "fundamental" rights or interests that are deeply rooted in this Nation's history and tradition. *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). As this Court wrote in *Glucksberg*:

> Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and

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the facts of this case, we conclude as a matter of law, that the developer had no cognizable *substantive due process claim* because its property interest in the building permits was created by state law, not the Constitution, and both the issuance and revocation of the building permits constituted executive and not legislative acts. (App. at p. 19).

13. [W]hen a plaintiff challenges the validity of a legislative act, substantive due process typically demands that the act be rationally related to some legitimate government purpose. In contrast, when a plaintiff challenges a non-legislative state action . . . we must look, as a threshold matter, to whether the property interest being deprived is 'fundamental' under the Constitution. If it is, then substantive due process protects the plaintiff from arbitrary or irrational deprivation, regardless of the adequacy of the procedures used. *If the interest is not 'fundamental,' however, the governmental action is entirely outside the ambit of substantive [due] process and will be upheld so long as the state satisfies the requirements of procedural due process.*

Nicholas, 227 F.3d at 142 (emphasis added).

> liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed[.]" Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking," that direct and restrain our exposition of the Due Process Clause.

Id. at 720-21 (citations omitted); *see also City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*, 538 U.S. 188, 123 S. Ct. 1389, 1397 (2003) (Scalia, J., Thomas, J., concurring).

Justice Scalia, with whom Justice Thomas joined, recently wrote that "[t]he judicially created substantive component of the Due Process Clause protects, we have said, certain 'fundamental liberty interests' from deprivation by the government, unless the infringement is narrowly tailored to serve a compelling state interest. . . . Freedom from delay in receiving a building permit is not among these 'fundamental liberty interests.'" *Buckeye Community Hope Foundation*, 538 U.S. 188, 123 S. Ct. at 1397.

"The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation and the right to bodily integrity. . . ." *Albright v. Oliver*, 510 U.S. 266, 272 (1994). As expressed by Justice Powell in his concurrence in *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985),

> Even if one assumes the existence of a property right, [], *not every such right is entitled to the*

> *protection of substantive due process.* While property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution, *Board of Regents v. Roth*, 408 U.S. 564, 577 . . . (1972), *substantive due process rights are created only by the Constitution.*
>
> The history of substantive due process "counsels caution and restraint." *Moore v. East Cleveland*, 431 U.S. 494, 502 . . . (1977) (opinion of POWELL, J., for a plurality). The determination that a substantive due process right exists is a judgment that "'certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.'" *Ibid.*, quoting *Poe v. Ullman*, 367 U.S. 497, 543 . . . (1961) (HARLAN, J., dissenting). In the context of liberty interests, this Court has been careful to examine each asserted interest to determine whether it "merits" the protection of substantive due process. *See, e.g., East Cleveland, supra; Roe v. Wade*, 410 U.S. 113 . . . (1973); *Griswold v. Connecticut*, 381 U.S. 479 . . . (1965). "Each new claim to [substantive due process] protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed." *Poe, supra*, 367 U.S., at 544 . . . (HARLAN, J., dissenting).

Ewing, 474 U.S. at 229; *see also Brown v. Brienen*, 722 F.2d 360 (7th Cir. 1983) (holding that there was no denial of substantive due process because

> 'substantive due process' is a shorthand for the fact that the Supreme Court has interpreted the due process clause of the Fourteenth Amendment

> to confer certain substantive rights based mainly on the Bill of Rights. . . . But [where] there is nothing in the Bill of Rights about protecting [certain] rights as such[,] [s]uch rights are protected under the due process clause of the Fourteenth Amendment if at all only as a form of property, of which the state cannot deprive a person without due process of law; they are not protected by the due process clause viewed as a conduit for applying portions of the Bill of Rights to the states.

Gardner v. City of Baltimore Mayor and City Council, 969 F.2d 63 (4th Cir. 1992) (holding that developer plaintiffs who claimed that they were denied substantive due process by the failure of various city officials to approve proposals for development "possessed no property interest protected by the Fourteenth Amendment."); *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822 (1st Cir.), *cert. denied*, 459 U.S. 989 (1982); *Chiplin Enterprises, Inc. v. City of Lebanon*, 712 F.2d 1524 (1st Cir. 1983) (building permit); *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir. 1991); *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023, 1034-37 (3d Cir.) (development plan), *cert. denied*, 482 U.S. 906 (1987); *Biser v. Town of Bel Air*, 991 F.2d 100, 104 (4th Cir. 1993) (no right to special zoning exception authorizing commercial buildings in the residential area), *cert. denied*, 510 U.S. 864 (1993); *South Gwinnett Venture v. Pruitt*, 491 F.2d 5 (5th Cir.) (*en banc*) (rezoning application), *cert. denied*, 416 U.S. 910 (1974), and, *cert. denied*, 419 U.S. 837 (1974); *Burrell v. City of Kankakee*, 815 F.2d 1127 (7th Cir. 1987) (rezoning application); *Scudder v. Town of Greendale*, 704 F.2d 999 (7th Cir. 1983) (building permit); *Carolan v. City of Kansas City, Mo*, 813 F.2d 178, 181 (8th Cir. 1987) (occupancy certificate); *Sylvia Dev. Corp.*, 48 F.3d 810 (4th Cir. 1995) (no right to special zoning designation authorizing residential subdivision on agricultural land).

In *Yardarm II*, the Fourth District quoted *Reserve Ltd. v. Town of Longboat Key*, 933 F. Supp. 1040, 1043-44 (M.D. Fla. 1996), which held that:

> [a]ttempting to correct [the Eleventh] [C]ircuit's jurisprudence regarding the Fourteenth Amendment's Due Process Clause, *McKinney* holds that . . . substantive due process claims arising from non-legislative deprivations of state-created property interests are no longer cognizable. . . . In *McKinney* . . . the Eleventh Circuit distinguished between procedural and substantive due process claims in the context of state-created rights and clarified that:
>
> > The substantive component of the Due Process Clause protects those rights that are "fundamental," that is, rights that are "implicit in the concept of ordered liberty[.]" . . . [A]reas in which substantive rights are created only by state law . . . are not subject to substantive due process protection under the Due Process Clause because "substantive due process rights are created only by the Constitution." As a result, these state law based rights constitutionally may be rescinded so long as the elements of procedural-not substantive — due process are observed.
>
> 20 F.3d at 1556 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 . . . (1937), and *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229 . . . (1985)) (citations omitted).

(App. at pp. 13-15).

Thus, *Yardarm II* is consistent with Eleventh Circuit substantive due process decisional law, i.e., *McKinney*, *Reserve*, and progeny,[14] which itself is now consistent with the majority of circuits throughout the country. *See Rhyce v. Martin*, 173 F. Supp. 2d 521, 531 (E.D. La. 2001) (finding that "[i]t appears that most circuits are now of th[e] view" that "property interests created by state law . . . are not subject to substantive due process protection[.]"), citing *McKinney*, 20 F.3d 1550, and *Nicholas*, 227 F.3d at 142-43; *see also Sutton v. Cleveland Bd. of Educ.*, 958 F.2d 1339, 1350 (6th Cir. 1992) (concluding that plaintiff's state created right to tenured employment lacks substantive due process protection); *Charles v. Baesler*, 910 F.2d 1349, 1353 (6th Cir. 1990) (holding that "[s]tate-created rights . . . do not rise to the level of 'fundamental' interests protected by substantive due process. Routine state-created [] rights are not 'deeply rooted in this Nation's history and tradition,' and, although important, are not so vital that 'neither liberty not justice would exist if [they] were sacrificed.'"), quoting *Bowers v. Hardwick*, 478 U.S. 186, 191-94 (1986), quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); and *Palko v. Connecticut*, 302 U.S. 319, 326 (1937); *Boston Envtl. Sanitation Inspectors Ass[']n v. City of Boston*, 794 F.2d 12 (1st Cir. 1986); *Schaper v. City of Huntsville*, 813 F.2d 709 (5th Cir. 1987).

Notwithstanding the decisional consistency on this substantive due process issue, the Petitioner alleges that *Yardarm II* conflicts with this Court and the rest of the nation. (Pet. at pp. 12-13). As support, Petitioner cites to *Board of*

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14. This Court previously denied McKinney's Petition for a Writ of *Certiorari* which presented the question of whether a plaintiff who has a state created property interest states a claim under the substantive component of the Due Process clause. 513 U.S. 1110 (1995).

Regents v. Roth, 408 U.S. 564, 577 (1972) (a procedural due process case holding that no property interest was deprived), *United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 279 (1943) (a takings case), and *Sauer v. New York*, 206 U.S. 536, 548 (1907) (a condemnation proceeding). Those cases, however, only discuss the concept of property as it relates to procedural due process and/or condemnation/takings claims, and make no mention of substantive due process. Therefore they are inapposite to establish the requisite decisional conflict with *Yardarm II*'s holding regarding whether Petitioner possessed a fundamental right with respect to its building permits entitling it to substantive due process protection.[15]

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15. Similarly, *Yardarm II* does not conflict with the other cases cited in the Petition (Pet. at p. 13 n.11). Specifically, in *Natale v. Town of Ridgefield*, 170 F.3d 258 (2d Cir. 1999), the plaintiff property owner brought suit against the defendant municipality seeking recovery for the violation of his rights in the issuance of zoning and building permits. *Id.* at 261. At the trial court level, judgment was entered in favor of the plaintiff. *Id.* at 262. However, on appeal, in addition to invalidating the judgment because of an error in the jury instructions, the Second Circuit held that:

> [R]etrial is not necessary . . . because, *as a matter of law, [the plaintiff] does not have a federally protectable right in the [building] permits for which he applied.*

Id. at 263 (emphasis added).

In *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430 (4th Cir. 2002), the Fourth Circuit assumed without deciding that the plaintiff had a protectable property interest, and only analyzed whether the actions taken by the government were irrational, arbitrary, or capricious to then affirm the grant of summary judgment for the government defendant on the plaintiff's substantive due process claim.

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Consequently, since the Petition does not demonstrate any conflict between *Yardarm II* and any applicable substantive due process federal decision, and in fact *Yardarm II*, and the Eleventh Circuit's *McKinney* decision and progeny upon which *Yardarm II* is based, are consistent with the decisional weight of authority throughout the country, the Petition should be denied.

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In *Bryan v. City of Madison*, 213 F.3d 267 (5th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001), the Fifth Circuit reasoned that "[i]n order to establish a substantive or a procedural due process violation by claiming denial of a property right, [the plaintiff] must first establish a denial of a constitutionally protected property right." *Id.* at 274. Applying those principles, the Fifth Circuit held that the *Bryan* plaintiff "never had the right that he claim[ed] the defendants denied him[,]" and therefore "[b]ecause [the plaintiff] [] failed to establish the denial of a property right, his due process claim fail[ed]." *Id.* at 267.

The *Weinberg v. Whatcom County* case, 241 F.3d 746 (9th Cir. 2001), cited by Petitioner, was a procedural due process case, and did not address any substantive due process issue. And in *Crown Point I, LLC v. Intermountain Rural Elec. Assn.*, 319 F.3d 1211 (10th Cir. 2003), the Tenth Circuit held that the developer had failed to establish that it had a protectable property interest.

The *Littlefield v. City of Afton* case, 785 F.2d 596 (8th Cir. 1986), cited by Petitioner, which held that the applicant for a zoning permit had stated a substantive due process claim under Minnesota law, was subsequently overruled by *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1104 n.2 (8th Cir. 1992) (holding that the plaintiff developer failed to state a cause of action for violation of substantive due process rights due to the city's enforcement of an invalid zoning plan ordinance).

III. THERE IS NO DECISIONAL CONFLICT BETWEEN *YARDARM II* AND ANY SUBSTANTIVE DUE PROCESS CASE CITED BY PETITIONER ANALYZING THE EXECUTIVE VS. LEGISLATIVE DISTINCTION. *YARDARM II* PROPERLY HELD THAT PETITIONER HAS NO SUBSTANTIVE DUE PROCESS CLAIM WITH RESPECT TO ITS BUILDING PERMITS BECAUSE, *INTER ALIA*, THE ACTS COMPLAINED OF WERE "EXECUTIVE" NOT "LEGISLATIVE."

Yardarm II did not hold that "[substantive] due process violations can only be committed by an official vote of the local legislative body." (Pet. at pp. i, and 13-17). As has been the case throughout these proceedings, Petitioner has confused the executive vs. legislative analysis required in *substantive due process* claims, with the "state actor" analysis inherent in all § 1983 claims, to erroneously argue that *Yardarm II* conflicts with other decisions.

As aptly described by the Third Circuit, "the fabric of substantive due process, as woven by our courts, encompasses at least two very different threads." *Nicholas*, 227 F.3d at 139. "The first thread of substantive due process applies when a plaintiff challenges the validity of a *legislative* act."[16] *Id.* (emphasis in original). The second thread of substantive due process protection applies to "non-legislative" or "executive" acts.[17] *Nicholas*, 227 F.3d at 139. Thus, the legislative vs.

16. If it does not involve a fundamental right, a substantive due process challenge to a legislative act is reviewed under a rational basis test. *See TRM, Inc. v. United States*, 52 F.3d 941, 945 (11th Cir. 1995).

17. State created or non-fundamental rights taken away by executive action do not form the basis for a substantive due process

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executive distinction is important to determine which "thread" to use.

In a substantive due process analysis, the difference between "legislative" and "executive" acts turns on who was affected. Executive acts apply generally to only one person, while legislative acts apply to all of society. *McKinney*, 20 F.3d at 1557 n. 9; *Collins & Co., Inc. v. City of Jacksonville*, 38 F. Supp. 2d 1338, 1342 (M.D. Fla. 1998); *Crymes v. Dekalb County, Georgia*, 923 F.2d 1482, 1485 (11th Cir. 1991); *Nicholas*, 227 F.3d at 139 n.1.

Here, the Fourth District properly applied federal law on this issue and concluded in *Yardarm II* that Petitioner had no substantive due process claim respecting the issuance and/or lapsing of its building permits because, *inter alia*, *those acts complained of were "executive" not "legislative."* (App. at pp. 16-19). *Yardarm II*'s conclusion was based on, *inter alia*, the fact that Petitioner never challenged any legislative enactment of any ordinance or regulation by the City Commission. Rather, Petitioner challenged the application by City employees and administrative officials of certain rules and ordinances specifically to Petitioner, which are clearly executive acts under the substantive due process analysis. *See, e.g., Wohl v. City of Hollywood*, 915 F. Supp. 339, 343 (S.D. Fla. 1995). Moreover, to this day, Petitioner provides no authority to support the position that the issuance and/or lapsing of building permits, are anything but executive acts.

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claim. *Id.*; *McKinney*, 20 F.3d at 1557 n.9; *North Florida Educ. Dev. Corp. v. Woodham*, 942 F. Supp. 542, 549 (N.D. Fla. 1996), *appeal at* 138 F.3d 955 (11th Cir. 1998); *Williams v. Goldsmith*, 905 F. Supp. 996, 1000 (M.D. Ala. 1995).

Thus, *Yardarm II* is consistent with Eleventh Circuit substantive due process precedent, *e.g.*, *McKinney* and progeny, which itself is consistent with the rest of the country.

The cases cited by Petitioner do not change the reality that for substantive due process purposes the acts complained of were "executive" not "legislative." Notably, neither *Monell v. Department of Soc. Serv. of the City of New York*, 436 U.S. 658 (1978); *City of St. Louis v. Praprotnik.* 485 U.S. 112 (1988); *Harman v. Forssenius*, 380 U.S. 528, 540 (1945); *Hughes v. Washington*, 389 U.S. 290, 298 (1967); *DeCarlo v. Fry*, 141 F.2d 56 (2d Cir. 1998); nor *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), cited by Petitioner (Pet. at p. 15), address substantive due process or the executive vs. legislative distinction there under. Instead, those cases deal with the issue of whether there could be municipal liability at all under 42 U.S.C. § 1983, which in the instant case was yet another fatal hurdle Petitioner was unable to overcome.[18]

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18. Petitioner misquotes *DeCarlo* and *Bohen v. City of East Chicago*, 799 F.2d 1180, 1189 (7th Cir. 1986), to attempt to create decisional conflict where none exists. (Pet. at pp. 15-16).

Moreover, neither *Nicholas*, 227 F.3d 133, nor *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983), cited by Petitioner, conflict with *Yardarm II.* In *Nicholas*, consistent with *Yardarm II*, *McKinney*, etc., the court held that to prevail on a *non-legislative* substantive due process claim, a plaintiff must establish he has a protected property interest. *Nicholas*, 227 F.3d. at 139-40. As to Petitioner's reliance on *Scott*, 716 F.2d 1409, to assert conflict, in *Scott*, the developer seeking the permit had already received informal approval that his proposed use was expressly reflected in the zoning classification required. *Id.* He was then informed by the legislative body, the County Council, that the area including his proposed development would be rezoned (a legislative act), and he would no longer be eligible for a permit. *Id.* These facts do not appear in the instant case. *Id.*

Thus, since there is no conflict here between *Yardarm II* and the decisions cited by Petitioner on the executive vs. legislative substantive due process issue, the Petition should be denied.

IV. THERE IS NO DECISIONAL CONFLICT REGARDING PROCEDURAL DUE PROCESS PRESENTED BY *YARDARM II*.

In *Yardarm II*, the Fourth District indicated that the portion of the 1999 Judgment finding Petitioner's procedural due process rights violated was erroneous, because, *inter alia*, Petitioner never pled nor tried any procedural due process claim. (App. at pp. 10-11). Petitioner's purported "procedural due process" claim was therefore disposed of on the independent state law ground that it was barred under Florida law by Petitioner's failure to plead. Thus, this Court should not address the complex procedural due process issues raised by Petitioner here where those issues were not tried below, and were disposed of on an independent state law basis.

Petitioner's reliance on the Fourth District's *dicta*, wherein it indicated that had Petitioner pled or tried a procedural due process claim, such a claim still failed because there was no deprivation and, even if there were, Petitioner was provided all the process it was due (App. at pp. 10-11), is misplaced.

First, as aptly discussed by the Fourth District, and undisputed by Petitioner, with respect to the City's attempt (in 1985) to repeal Petitioner's 1973-74 special use exception (after Petitioner had failed to use it in over ten (10) years), the ordinance to repeal the special exception was never actually enacted and *Petitioner's special exception was never repealed*. (App. at p. 11). "Hence," the Fourth District stated, "assuming, for the sake of argument, that [Petitioner] had an

interest in the special exception, *it was never deprived of it.*" (App. at p. 11) (emphasis added).

Such reasoning by the Fourth District is completely consistent with procedural due process law throughout the country which requires that there be a "deprivation."

Second, with respect to the Fourth District's discussion in *dicta* regarding the acts by the Building Official on Petitioner's building permits that were complained about, i.e., the revocation of Petitioner's building permit in 1974 for failure to comply with applicable codes and regulations, and the lapsing of Petitioner's building permit by operation of the South Florida Building Code in 1979 and 1985 due to lack of progress, there is no conflict between the Fourth District's reasoning that since Petitioner had the right to administratively appeal to the Broward County Board of Rules of Appeals ("BCBRA"), with alternative and/or further review by the circuit court, Petitioner had been provided with adequate procedural due process.[19]

The Fourth District's reasoning was again based on Eleventh Circuit law, including, among other decisions, *Boatman v. Town of Oakland*, 76 F.3d 341 (11th Cir. 1996) (holding that property owners' civil rights action against a town for its refusal to issue them a certificate of occupancy did not fall under the procedural component of § 1983 because the state provided them all the process they were due, i.e., the right to repair to the circuit court and seek an order compelling a final inspection).

The Eleventh Circuit decisional law on this topic is likewise consistent with its sister circuits which almost

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19. Contrary to the representations in the Petition (pp. 20-21), no hearings are required by law or otherwise *before* a building permit lapses for lack of progress under the South Florida Building Code.

uniformly hold that a state provides constitutionally adequate procedural due process when it provides reasonable remedies to rectify a legal error by a local administrative body. *See, e.g., Midnight Sessions, Ltd. v. Philadelphia*, 945 F.2d 667, 680 (3d Cir. 1991) (holding that city provided adequate procedural due process where judicial mechanism existed under which to challenge administrative decision to deny application for dance hall licenses), *overruled on other grounds by United Artists*, 316 F.3d at 400. Moreover, when a state affords a "full judicial mechanism" with which to challenge administrative decisions . . . , the state provides adequate procedural due process, regardless of whether the plaintiff avails itself of that appeal mechanism. *Id.*; *see also Crocker v. Hakes*, 616 F.2d 237 (5th Cir. 1980) (holding that where the plaintiff was granted a hearing before the City Council, and as a result of his petition in state court, he received a hearing before the Board of Zoning Appeals, and had the right to seek relief in state court, there already exists a state created avenue for review that satisfies due process).

Here, it is undisputed that Petitioner was aware of its right to, and actually did, repair to the BCBRA and/or circuit courts, or unilaterally chose not to.

Thus, since *Yardarm II*'s holding on Petitioner's purported procedural due process claim was based on an independent state law ground, and in any event the Fourth District's reasoning does not conflict with federal decisional law, the Petition should be denied.

V. THE PETITION PRESENTS NO INTOLERABLE CONFLICT AMONG THE NATION'S LOWER COURTS, NO CONFUSION OR ERROR SO IMPORTANT THAT IT MUST BE CORRECTED IMMEDIATELY, AND NO NEED FOR THE COURT TO EXPAND THE SUBSTANTIVE COMPONENT OF DUE PROCESS.

As its fifth "ground" for review, Petitioner attempts to convince this Court that there is a need to expand the substantive component of due process to create a federal cause of action for developers whose property has not been taken and who have not been deprived of any fundamental right. Yet, to do what the Petitioner requests would upset settled expectations, start the Court sliding down a slippery slope, and otherwise confuse the law.

Contrary to the representations by Petitioner, this case involves a local land-use dispute, and resolving such routine land-use disputes that inevitably and constantly arise among developers, local residents, and municipal officials is not the business of the federal courts. As has been repeatedly recognized, "allowing 'every allegedly arbitrary denial by a town or city of a local license or permit' to be challenged under [federal law] would 'swell[] our already overburdened federal court system beyond capacity.'" *Gardner*, 969 F.2d at 68, quoting *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54 (2d Cir. 1985).

Petitioner would endow every disappointed property owner with a federal claim, because every appeal from an adverse ruling necessarily encompasses a claim that the determination by the local agency was, from the owner's point of view, irrational, arbitrary, capricious and an abuse of the agency's discretion. *Cf. Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982), *cert. denied*,

459 U.S. 989 (1982). Petitioner's position is inconsistent with the oft-stated admonition that federal courts should not be converted into super zoning boards or zoning boards of appeal. *See, e.g., Raskiewicz v. Town of Boston*, 754 F.2d 38, 44 (1st Cir.), *cert. denied*, 474 U.S. 845 (1985); *Albery v. Reddig*, 718 F.2d 245 (7th Cir. 1983); *Construction Industry Ass'n Sonoma Cty. v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976). This Court should not accept Petitioner's invitation to create "a rack upon which every disappointed developer can stretch a community that fails to roll out the red carpet for him." *Chongris v. Board of Appeals of Town of Andover*, 811 F.2d 36, 46 (1st Cir.), *cert. denied*, 483 U.S. 1021 (1987).

As explained in *Creative Environments, Inc.*:

> Such a claim is too typical of the run of the mill dispute between a developer and a town planning agency, regardless of [plaintiff's] characterizations of it and of defendants' alleged mental states, to rise to the level of a due process violation. The authority . . . , all suggest that the conventional planning dispute — at least when not tainted with fundamental procedural irregularity, racial animus, or the like — which takes place within the framework of an admittedly valid state subdivision scheme is a matter primarily of concern to the state and does not implicate the Constitution. This would be true even were planning officials to clearly violate, much less "distort" the state scheme under which they operate. A federal court, after all, "should not ... sit as a zoning board of appeals." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 12 . . . (1974) (Marshall, J., dissenting). *Every* appeal by a

> disappointed developer from an adverse ruling by a local . . . planning board necessarily involves some claim that the board exceeded, abused or "distorted" its legal authority in some manner, often for some allegedly perverse (from the developer's point of view) reason. It is not enough simply to give these state law claims constitutional labels such as "due process" or "equal protection" in order to raise a substantial federal question under section 1983. As has been often stated, "[t]he violation of a state statute does not automatically give rise to a violation of rights secured by the Constitution." *Crocker v. Hakes*, 616 F.2d 237, 239 n.2 (5th Cir. 1980) (*per curiam*).

Id. at 833 (emphasis in original) (footnote omitted). The First Circuit has recently reaffirmed this ruling. *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir. 1991), *cert. dismissed as improvidently granted*, 503 U.S. 257 (1992).

Consequently, this Court should not accept Petitioner's invitation to expand the substantive component of due process to create a federal cause of action for developers whose property has not been taken and who have not been deprived of any fundamental right, because to do so would, *inter alia*, upset settled expectations, start the Court sliding down a slippery slope, and otherwise confuse the law.

CONCLUSION

Since none of the grounds asserted by Petitioner support a case for review, because, *inter alia*, the Fourth District decision did not create any conflict, let alone an intolerable conflict among the nation's lower courts, the Fourth District did not commit any error, let alone an error so important that it must be corrected immediately, and there is no need for this Court to expand the substantive component of due process to create a federal cause of action for developers whose property has not been taken and who have not been deprived of any fundamental right, Respondent, the City of Pompano Beach, respectfully requests the Court to deny the Petition for a Writ of *Certiorari*.

Respectfully submitted,

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